



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Goodwin Contractors

File: B-228336

Date: December 17, 1987

DIGEST

1. Late bid was properly rejected where paramount cause of lateness was Postal Service's attempted deliveries of express mail parcel outside of contracting agency's normal business hours after which the Postal Service turned express mail parcel over to regular route unit for normal delivery.
2. Late bid may not be considered on ground that during pre-bid-opening telephone conversation with contracting agency, in which arrival of its bid modification was confirmed, protester inferred its bid also had arrived. Contracting agency has no duty to volunteer bid arrival status. A bidder has the responsibility to ensure the timely arrival of its bid and must bear the responsibility for late arrival.
3. Protest that agency should have postponed bid opening due to unannounced closure of agency office on day prior to opening date due to Papal visit is denied, where office was open on bid opening day and only protester's bid was late.

DECISION

Goodwin Contractors protests the rejection of its bid as late under solicitation No. AZ-PEFO 10 (1), issued by the Arizona division, Federal Highway Administration (FHWA), for a highway project in the Petrified Forest National Park.

We deny the protest.

The solicitation was issued on August 14, 1987, and provided that bids would be opened at the FHWA division office in Phoenix, Arizona, at 11 a.m., Tuesday, September 15, 1987. The division office is located on the third floor of a six-story private office building in downtown Phoenix.

Goodwin mailed its bid from Blackfoot, Idaho, via United States Postal Service express mail at 2:52 p.m., Saturday,

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September 12, 1987. The Postal Service accepted the package for guaranteed delivery "by the second day."

Delivery was first attempted by the Postal Service on Sunday, September 13 (not a working day) at 2:03 p.m. According to the express mail label there was no notice of delivery left since the building was closed. The Postal Service again attempted delivery on Monday, September 14 at 7 a.m. According to FHWA, 7 a.m. is outside normal working hours. Again, no notice of attempted delivery was made.

The Secret Service had ordered the building closed and locked Sunday and Monday because of a parade in honor of the Pope's September 14 visit that would proceed down the street outside the building in which the FHWA office was located. The contracting officer was aware of this plan on Thursday, September 10. Since the office would be closed on Monday, an otherwise normal business day, he considered postponing the bid opening.^{1/} However, since the FHWA office would be open during normal business hours on the day of bid opening, September 15, he decided not to postpone the opening because an important segment of bidders would not have delivery of bids delayed by the September 14 closure.

After the second unsuccessful delivery attempt, the package was turned over to the regular route unit for normal mail delivery the next day. On Tuesday, September 15, 1987, the FHWA office returned to normal operations, but it did not receive any notice that prior mail deliveries had been attempted.

At approximately 9:30 a.m., Goodwin telephoned the Arizona Division of FHWA to confirm that a telefaxed bid modification had arrived. Goodwin, which was unaware of the September 14 closure, did not inquire whether its original bid had arrived. According to Goodwin, as the FHWA employee with whom it spoke requested the amount of Goodwin's bid and stated that "the bid hasn't been opened," Goodwin concluded that its bid had arrived. Goodwin's call had been directed to the Assistant Division Administrator, who was aware of the receipt of the bid modification because the telefax machine is in his office, but who does not conduct the bid

^{1/} In accordance with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.402-3 (1986), a bid opening may be postponed where "[t]he contracting office has reason to believe that the bids of an important segment of bidders have been delayed in the mails or causes beyond their control and without their fault or negligence (e.g., flood, fire, accident, weather conditions, or strikes)"

openings and was unaware of what bid packages actually had been received. Ordinarily, the Assistant Division Administrator states, he would have referred Goodwin to a more knowledgeable person, but that employee was occupied at the time of the call and unable to come to the telephone.

Three hand-carried bids arrived prior to bid opening on September 15, of which two were from concerns outside of Phoenix. At 11 a.m., those bids were opened and recorded. Goodwin's bid arrived at 11:15 a.m. as part of the regular mail. Although the express mail label indicates time of delivery as "11 a.m.," as well as "11:15 a.m." the FHWA employee who signed for the package and the postman agree that it was not delivered until 11:15 a.m. The 11 a.m. notation reportedly indicates the time the postman entered the building.

Because it was received after bid opening time, Goodwin's bid was not opened and was rejected as late. Goodwin's modified bid apparently would be the low bid. Pending the resolution of the protest, FHWA has withheld award of the contract.

Goodwin relies upon a combination of circumstances to support its claim that its bid should not be considered late. Goodwin first suggests that FHWA should have postponed the bid opening due to the unexpected closure of its offices the day before bid opening, consistent with the regulatory guidance to do so when there is reason to believe that the bids of an important segment of bidders have been delayed in the mails for reasons beyond their control and not due to their negligence. Goodwin argues that since it represents 25 percent of all bidders who responded to the solicitation, an "important segment" of bidders was denied the opportunity to compete because the bid opening was not extended. Goodwin next alleges that FHWA, knowing its offices were closed on a regular business day, and having notice of attempted delivery, should have arranged to pick up the express mail package prior to the time set for bid opening. Similarly, Goodwin maintains that when it inquired about its bid modification, FHWA should have informed it that its bid had not been received, so that Goodwin could arrange for delivery. Finally, Goodwin alleges that in spite of these circumstances, its bid was delivered in time for the bid opening.

The FHWA denies any mishandling and maintains that Goodwin's bid was received after bid opening time. It contends that neither of the exceptions for consideration of late bids provided in the FAR, 48 C.F.R. § 52.214-7, and incorporated by reference in the solicitation, applies. Further,

postponement of the bid opening was not appropriate. We agree with the FHWA.

The late bid clause provides that a late bid will be considered only if it was received before award and (1) was sent by registered or certified mail at least 5 days prior to the opening date, or (2) the late receipt was due solely to government mishandling after receipt at the government installation. Neither of these exceptions applies here.

Express mail is not considered certified or registered mail for purposes of the first exception, Nuaire, Inc., B-221551, Apr. 2, 1986, 86-1 C.P.D. ¶ 314, and, in any event, Goodwin's bid was not mailed until 3 days before bid opening. The second exception does not apply because the bid itself was already late when it was received at the government installation, which in the context of the late bid clause, means the local agency office, not the local post office. Id. Contrary to Goodwin's allegation, the record only supports a finding that the bid was received at 11:15 a.m., after the time set for bid opening.

We have recognized, however, that where a protester shows that government mishandling during the process of receipt (as distinguished from mishandling after receipt) was the paramount reason its bid was late, the bid may be considered. Nuaire, Inc., B-221551, supra. For instance, where bids are delivered to a local post office for pick up by agency personnel, the agency has a duty to establish procedures to ensure that the physical transmission of bids is accomplished within a reasonable time of their receipt. Federal Contracting Corp., 56 Comp. Gen. 737 (1977), 77-1 C.P.D. ¶ 444. Thus, mishandling may be charged to the government where the delay in the transmission of a bid is due to the agency's failure to use a transmittal procedure that would have permitted the bid to be delivered to the bid opening location within a reasonable time before bid opening. In order to conclude that a bid was late solely as a result of government mishandling, it must be established that the agency had been given some notice concerning the bid prior to the time set for bid opening. Nuaire, Inc., B-221551, supra; Data Monitor Systems, Inc., B-220917, Jan. 23, 1986, 86-1 C.P.D. ¶ 82.

Here, bids were to be addressed not to a post office box, but to the street address of the FHWA office; there is no indication that the contracting agency had a regular practice of collecting bids from a post office box prior to scheduled openings. Goodwin dispatched its bid on the Saturday afternoon prior to a Tuesday bid opening. The Postal Service made two attempts at delivery which from their timing would appear doomed to failure even if the

Pope's visit had not occurred. These delivery attempts were made on Sunday, a non-business day, and at 7 a.m. on Monday, before regular business hours. There apparently was no one with whom to leave notice at these times, as a result of which, it would appear, the Postal Service failed to provide any written notice to FHWA of these attempted deliveries. The Postal Service also failed to telephone the FHWA on Tuesday morning even though the recipient's telephone number had been provided on the package label.

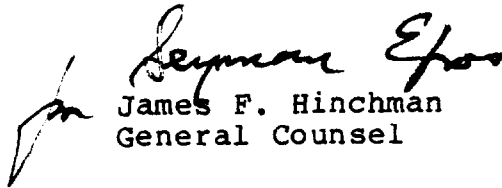
Where, as here, the Postal Service does not hold mail for collection by agency personnel, absent notice from the Postal Service, we are unwilling to infer a duty to inquire about the possible delivery of mail and thereby arrange to pick it up prior to a bid opening. The acts and omissions of the Postal Service, not the contracting agency, were the paramount cause of delay in receipt of Goodwin's bid and mishandling by the Postal Service is not within the ambit of government mishandling. See Minority Business Enterprises, Inc., B-211836, May 31, 1983, 83-1 C.P.D. ¶ 583.

We also find no duty to volunteer the arrival status of bids prior to bid opening. Although Goodwin assured itself that its modification had arrived, it failed to inquire about its original bid. By failing to do so, Goodwin assumed the risk that the agency representative to whom it spoke was unaware of whether the bid had arrived. The ambiguous statement attributed to the agency employee to the effect that the bid had not been opened does not change our conclusion. Under the circumstances, we do not find that Goodwin could reasonably have relied on such a statement. In light of the proximity of the call to bid opening time, and the agency representative's ignorance of any particular bid's arrival status, the only possible meaning of the statement was that no bids had been opened. In any case, a contracting officer's failure to respond to an inquiry about a bid's arrival is not ground for consideration of a late bid, since a bidder has the responsibility to ensure the timely arrival of its bid and must bear the responsibility for late arrival. See Tenavision Inc., B-207977, July 20, 1982, 82-2 C.P.D. ¶ 64.2/

2/ In any event, since the protester was in Idaho and, as of Tuesday morning, the Postal Service had turned the bid over for regular route delivery in Arizona, we doubt the likely success of any efforts to locate the bid or arrange for a substitute in the hour and a half remaining before bid opening.

Finally, we find unobjectionable the contracting officer's decision not to postpone the bid opening. The office was open to receive bids on the bid opening day and three hand carried bids arrived that day prior to 11 a.m. Even though Goodwin's bid was 25 percent of all bids ultimately received, we agree with FHWA that one delayed bid is not an "important segment" within the meaning of FAR, 48 C.F.R. § 14.402-3. One affected bidder is insufficient to warrant postponement of bid opening. See Nikon Inc., B-211047, Apr. 1, 1983, 83-1 C.P.D. ¶ 345; Ecology and Environment, Inc., B-188354, June 15, 1977, 77-1 C.P.D. ¶ 428.

The protest is denied.


James F. Hinchman
General Counsel